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In The

Supreme Court of the United States

October Term, 1988

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,

Petitioners,

v.

BRIDGET MERGENS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF CHRISTIAN ADVOCATES SERVING EVANGELISM IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS IN THIS CASE*

This case presents important issues concerning the freedom of speech for all Americans. The American tradition of free and open discourse in public places has

*Counsel of Record to the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

contributed greatly to the success of our democracy. Christian Advocates Serving Evangelism (CASE) is opposed to Petitioners' attempt to restrict religious speech in a public high school's limited open forum that is generally accessible to nonreligious student groups. CASE believes that the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed and that this Court should issue its opinion in favor of Respondents' First Amendment rights.

CASE is a Christian ministry dedicated to protecting, preserving, and defending First Amendment rights to proclaim the Gospel of Jesus Christ in public places. As one of its tenets, CASE seeks to strengthen the individual citizen's respect for, and allegiance to, our constitutional form of government. CASE undertakes to assist litigants throughout the United States in significant cases relating to First Amendment freedoms, and CASE lawyers have specialized in litigation in both state and federal courts with regard to various First Amendment issues. CASE believes the experience of its counsel will be of assistance to the Court in this case.

ARGUMENT

I. THE EQUAL ACCESS ACT AND THE FIRST AMENDMENT REQUIRE THAT CURRICULUM RELATEDNESS BE DETERMINED BY AN OBJECTIVE TEST RATHER THAN BY AN IMPOSSIBLE-TO-MEET AND ARBITRARY SUBJECTIVE TEST OF SCHOOL OFFICIAL INTENT.

A. Regardless of School Officials' Subjective Intent, Groups that are Not Directly Related to the School Curriculum and that Are Not Truly Sponsored by the School Are Noncurriculum Related Groups under the Act.

1. The Act by Its Terms Establishes an Objective Definition of "Noncurriculum Related Student Groups."

A school establishes a limited open forum, and thereby brings itself within the coverage of the Equal Access Act, when it "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The Act defines "meeting" to include student activities *"not directly related to the school curriculum." Id.* § 4072(3). *See also* 130 Cong. Rec. S8362 (daily ed. June 27, 1984) (statement of Sen. Dole) ("the bill's definition of 'limited open forum' . . . encompass[es] only those student group meetings that are not directly related to the school's curriculum"). Thus, the Act defines "noncurriculum related student groups" not according to the subjective intent of school officials but according to the

directness of the relationship between the groups' activities and the school's academic or instructional curriculum.

Further clarification of the meaning of "noncurriculum related" and "not directly related to the school curriculum" may be found in the legislative history of the Act.[1]

2. The Legislative History of the Act Confirms the Objective Definition of "Noncurriculum Related Student Groups."

Throughout the floor debates on the Act in both houses of Congress, "noncurriculum related student groups" were identified by their lack of direct relationship to the school's instructional curriculum and by their lack of school sponsorship. They were not identified according to the subjective opinion of school officials.

a. The Senate Debates

On the Senate floor, Senator Hatfield, a principal sponsor of the Act, was asked to clarify the meaning of

[1] The direct legislative history of the "noncurriculum related" language is confined to the floor debates in the Senate and House of Representatives. No committee reported on the final version of the bill containing the "noncurriculum related" language because the final version was introduced on the Senate floor as a perfecting amendment to a previous version of the Act, S. 1059, and on the House floor as an amendment to the Emergency Math/Science Education Act. 130 Cong. Rec. S8338 (daily ed. June 27, 1984) (statement of Sen. Hatfield); *id.* H12270 (daily ed. Oct. 11, 1984) (statement of Rep. Bonker).

"limited open forum" and "noncurriculum related." 130 Cong. Rec. at S8342 (daily ed. June 27, 1984) (statement of Sen. Gorton). Sen. Hatfield stated that a limited open forum is created when "the school permits legitimate activities *outside of the instructional activities of the school,*" and that an activity is "noncurriculum related" when it is not "a kind of *extension of the classroom.*" *Id.* (emphasis added). Foreign language clubs, for example, are extensions of existing foreign language classes, and are therefore not noncurriculum related. *Id.* However, "the chess club, the Young Democrats, the Young Republicans, and various and sundry other such clubs would certainly not be in the curriculum-related category." *Id.* Interscholastic athletic programs such as high school football teams are curriculum related because they grow out of the physical education curriculum, are supported directly by tax dollars, and are led by faculty members hired specifically for that purpose. *Id.*[2] The same is true of cheerleading squads, some drama clubs, and school bands. *Id.*

In short, "one of the keys to the noncurriculum-related student organization is that it is not *sponsored* by the school." *Id.* (statement of Sen. Gorton) (emphasis added). "Sponsorship" in this context "has to do with *official participation,* . . . the *directing* of that activity, and the *leading* of that activity, and the *orchestrating* of that activity." *Id.* (statement of Sen. Hatfield) (emphasis added). As the Act itself provides, " 'sponsorship'

[2] A previous version of the Act specifically excluded "any officially sponsored school athletic team that participates in interscholastic competition" from its definition of "voluntary extracurricular activities. S. 1059, 98th Cong., 1st Sess. (1983).

includes the act of promoting, leading, or participating in a meeting." 20 U.S.C. § 4072(3). *See also Hazelwood School District v. Kuhlmeier*, 484 U.S. ___, 98 L. Ed. 2d 592, 605 (1988) (defining school sponsorship).

Thus, the Equal Access Act is triggered by the existence of student organizations on campus that are not sponsored by the school, *as the term sponsorship is objectively defined under the Act* (i.e., funded, participated in, led, directed, or orchestrated by the school). School officials may not circumvent the Act by *claiming* to sponsor student groups or by re-defining sponsorship more broadly than does the Act, as the school officials have attempted to do in this case. *See* Section I.C. *infra*.

b. The House Debates

The legislative history in the House of Representatives parallels that in the Senate. On the House floor, Representative Goodling (R.-Pennsylvania), also emphasized the objective sponsorship element in defining "noncurriculum related student groups." Rep. Goodling focused on whether public schools "usually . . . *sponsor*" the activity in question. 130 Cong. Rec. H7732 (daily ed. July 25, 1984) (emphasis added). Thus, "academic, athletic, or musical" activities such as "[a] Latin club, a soccer team, and a school band" all are clearly curriculum related under the Act. *Id*. However, echoing the distinctions drawn in the Senate, "[a] young Democrat or Republican club, private social organizations, or religious groups" are noncurriculum related under the Act. *Id*. If it is unclear whether the activity is one that public schools usually sponsor, the question becomes whether *"the school or a schoolteacher require[s] or directly encourage[s] student participation in such group in connection with curriculum course work." Id*. If so, the meeting would be considered curriculum related and the equal access policy would not be triggered. *Id*.

Thus, Congress broadly defined noncurriculum related student groups by narrowly defining curriculum-related activities. To summarize the provisions of the Act and its legislative history, the following are characteristics of *curriculum*-related activities which do not trigger the equal access concept:

(1) Most importantly, the activity is directly related to specific courses in the school, as language clubs are to language classes, science and mathematics clubs are to those classes, and a drama club is to a drama class.

(2) The activity is funded entirely or substantially by the school, including provision of a specially paid faculty sponsor, rather than the school simply providing a meeting room and necessary "overhead" expenses such as heat and light.

(3) The activity is organized by the school independent of student initiation.

(4) The activity officially represents the school to the community (e.g., interscholastic athletic teams, cheerleading squads, or some musical groups).

(5) Participation in the activity is "required or directly encouraged" in connection with

> curricular course work (e.g., foreign language clubs; speech and drama clubs in schools with forensics and drama classes).[3]

Because many of the student groups meeting at Westside High School do not satisfy any of the above criteria, they are noncurriculum related groups under the Act and the school has created a forum by allowing them to meet. *See* Section I.C. *infra*.

3. School Officials May Not Circumvent the Act Simply by Declaring that All Nonreligious Student Groups Are Curriculum Related.

The objective definition of noncurriculum related groups in the text of the Act, § 4072(3), and the elaboration upon that objective definition in the legislative history demonstrate that local school officials are not free to circumvent the Act simply by deeming all groups to be curriculum related or school-sponsored, heedless of those activities' actual relationship to the school's curricular course work. Congress clearly contemplated that the distinction between curriculum related and noncurriculum

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[3] A student group that objectively is noncurriculum-related cannot, in an attempt to evade the Equal Access Act, be transmogrified into a curriculum-related group by being redesigned to meet the second through fifth factors. Such "a subterfuge for content based discrimination against a student-initiated religious club" would be contrary to this Court's decision in *Healy v. James*, 408 U.S. 169, 181-83 (1972), prohibiting a university from refusing a campus organization official recognition when such refusal would severely hamper the ability of students to meet. Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135, 144-45 (1983).

related activities was an objective distinction, to be made on the basis of the factors outlined above, and not on the basis of local officials' private, variable, and potentially overbroad conceptions of curriculum relatedness.[4] This is precisely the position stated in "The Equal Access Act Guidelines":

> [A] local school cannot defeat the intent of The Equal Access Act by some all encompassing definition that arbitrarily results in all but one or a few student clubs being defined as curriculum related.

130 Cong. Rec. H12271 (daily ed. October 11, 1984) (statement of Rep. Bonker).[5]

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[4] Senator Hatfield at one point in the floor debate disclaimed any intention to limit the discretion of school districts "to determine where the line is to be drawn between curriculum-related activities and noncurriculum-related." 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statements of Sen. Gorton and Sen. Hatfield). He made it clear, however, that school districts could engage in such line drawing by their actions and not merely by playing word games. Thus, the school district could determine that a cheerleading squad should be curriculum related *by assigning a teacher to lead the squad. Id.* (statement of Sen. Hatfield).

[5] "The Equal Access Act Guidelines" were drafted jointly by numerous private groups that had participated, on both sides of the issue, in drafting and debating the Act. 130 Cong. Rec. H12270 (daily ed. October 11, 1984) (statement of Rep. Bonker). The Guidelines "are intended as an explanation and do not reflect the official position of the Congress or the U.S. Government." *Id.* at H12273 (statement of Rep. Goodling).

The semantic gymnastics adopted by the school officials in this case should be rejected, just as similar definitional gamesmanship was rejected in *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). In *Fowler*, a city ordinance prohibited persons from addressing religious meetings in public parks. The city applied the ordinance against a Jehovah's Witness speaker who addressed a religious meeting in a public park, but conceded that it would not have applied the ordinance against a speaker at a Protestant church service in the same park. *Id.* at 69. This Court pointedly dismissed the city's argument that the Jehovah's Witness speaker's expression differed from that of a Protestant minister:

> To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id. at 70. Here, the school officials' description of the words one student group speaks as "curriculum related" and the words of another student group as "noncurriculum related" – without any objective distinction between the student groups in terms of school sponsorship or relation to the instructional curriculum – is an indirect way of excluding religious speech entirely.

A subjective, school-by-school interpretation of curriculum-relatedness would render the Act ineffectual, as the Court of Appeals held:

> Allowing such a broad interpretation of "curriculum-related" [as that advanced by the school officials] would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and

> choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. *A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.*

Mergens v. Board of Education, 867 F.2d 1076, 1078 (8th Cir. 1989) (emphasis added).

B. This Court Uses an Objective Standard in Evaluating State Action Burdening First Amendment Rights.

1. This Court Condemns Arbitrary, Discretionary, or Subjective Standards for Official Action Affecting Religious and Other Expression as a Prior Restraint.

It is well established that statutes and ordinances requiring that permits be obtained from local officials as a prerequisite to the use of public places "constitute[] a prior restraint on freedom of speech, press and religion, and, in the absence of *narrowly drawn, reasonable and definite standards* for the officials to follow, must be invalid." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (emphasis added), citing *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938). *See also Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. New Jersey*, 308 U.S.

147 (1939). If the license-issuing practice lacks clear standards or allows arbitrary refusal to grant a license, it impermissibly gives "an administrative official discretionary power to control in advance the right of citizens to speak on religious matters." *Kunz*, 340 U.S. at 293. *See also Niemotko*, 340 U.S. at 273. Standard-less discretion also unconstitutionally hinders judicial review of governmental officials' decisions, as this Court recently stated in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. ___, 100 L. Ed. 2d 771 (1988):

> [T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Id. at 783. *See also id.* at 792 ("Such a minimal requirement cannot provide the standards necessary to ensure constitutional decision-making, nor will it, of necessity, provide a solid foundation for eventual judicial review.")

Such arbitrary and standard-less powers cannot be justified as time, place, or manner restrictions. In the licensing situation, the "covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority . . . [are] inherently inconsistent with a valid time, place, and manner regulation

because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981).

The same is true when deciding whether a forum has been opened. School officials may not be permitted unfettered discretion to define at their arbitrary and subjective whim which forums are open or closed, or which student groups are or are not curriculum related. Otherwise, school officials would be free to engage in the covert forms of discrimination and suppression against which the First Amendment is meant to protect.

This Court has previously rejected a subjective forum-relatedness standard. In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. ___, 96 L. Ed. 2d 500, 508 (1987), airport officials sought to enforce a ban on "expressive activity unrelated to airport-related purposes." This Court rejected the proposed subjective limitation:

> [T]he result of this vague limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that "confers on police a virtually unrestrained power to arrest and charge persons with a violation" of the resolution is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident."

Id. at 509, quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135-36 (1974) (Powell, J., concurring).

In this case, the school district argues that no forum had been opened because a school official "testified that, *in his opinion*, all clubs and activities at WHS are curriculum related." *Mergens v. Board of Education*, No. CV 85-0-426, slip op. at 12 (D. Neb. Feb. 2, 1988) (emphasis added). However, "the exercise of [the] freedoms of speech and religion protected by the First and Fourteenth Amendments, [have] a firmer foundation than the whims or personal opinions of a local governing body." *Niemotko*, 340 U.S. at 272.

2. This Court Also Measures Curriculum Relatedness by an Objective Standard Rather than by Subjective Intent.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. ___, 98 L. Ed. 2d 592 (1988), this Court distinguished curriculum-related student speech from noncurriculum-related student speech on the same basis as does the Equal Access Act. The Court focused on whether the activity in question was *"school-sponsored"* so that "students, parents, and members of the public might reasonably perceive [the activity] to bear the imprimatur of the school." 484 U.S. at ___, 98 L. Ed. 2d at 605 (emphasis added). Activities that are school sponsored and bear the school's imprimatur "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id. Only* when student activities are "part of the school curriculum" by this definition have school officials " 'reserve[d] the forum for its intended purpos[e]' as a

supervised learning experience for . . . students" and not created a limited open forum. *Id.*, quoting *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983).

The record in this case demonstrates that many of the student groups at Westside High School are noncurriculum related and not school-sponsored under this Court's definition of those terms in *Hazelwood*, as well under Congress' definition of those terms in the Equal Access Act.

C. The Court of Appeals Correctly Held that the Forum at Westside High School Was Not Limited to Curriculum Related Groups (Properly Defined).

Several of the student groups actively meeting at Westside High School clearly are "noncurriculum related student groups" as that term is objectively defined by the Equal Access Act: the groups are not objectively directly related to specific curricular courses, the meetings are not truly sponsored by the school, and participation in those groups is not required or directly encouraged as part of any curricular course work. In fact, several of the student groups fall within categories that Congress specifically intended to designate as noncurriculum related. Interact and Zonta are service clubs affiliated with Rotary International and are therefore "private social organizations" that are noncurriculum related under the Act. 130 Cong. Rec. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling). The Chess Club, which, contrary to the District Court's finding, is not an extension of the high school's "logic class" because no such class exists (Tr.

265:5-7), "would certainly not be in the curriculum-related category." 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield). For Interact, Zonta, the Chess Club, the Ski Club, and the Subsurfers Club, among others, (i) the clubs are initiated by students, not by the school, (ii) attendance is completely voluntary, (iii) none is offered as a prerequisite for class credit or graduation, and (iv) the school's participation is limited to providing teachers merely to fulfill the role of a monitor. (Tr. 83:16-23; 140:20-141:1; 177:1-11; 176:12-19; 222:11-16; 269:21-23; 401:23-402:18). Neither the school officials' mere "opinion [that] all clubs and activities at WHS are curriculum related," *Mergens*, No. CV 85-0-426, slip op. at 12, nor their arbitrary designation of the groups as school-sponsored, in any way change the objective facts: the clubs are not sponsored by the school and participation is not required or encouraged as part of any curricular course work.

II. THE EQUAL ACCESS ACT AND THE FIRST AMENDMENT REQUIRE THAT WHETHER A FORUM HAS BEEN OPENED BE DETERMINED BY THE SCHOOL'S POLICY AND PRACTICE RATHER THAN BY THE SUBJECTIVE INTENT OF SCHOOL OFFICIALS.

This Court has never allowed the existence of a traditional public forum to hinge on the subjective intent of governmental officials about public use of streets and parks. It has never allowed the creation of an open forum to depend on the subjective and arbitrary decision of governmental officials about a group's requested access to other public property. The same approach should be

taken to the definition and creation of limited open forums in public schools.

A. The *Hazelwood* Decision and Other Decisions, and the First Amendment, Do Not Allow a School District To Exclude Expression Based on a Subjective Intent To Avoid a Limited Forum While Having a Policy or Practice that Opens a Limited Forum.

In concluding that Westside High School is a closed forum because of the school officials' "opinion" that all existing student groups were curriculum related, the District Court "ignore[d] the ancient wisdom that calling a thing by a name does not make it so." *Madison School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174 (1976). This Court has never relied on government officials' expression of their subjective intent in determining whether a public forum has been created.

1. *Hazelwood* Employed an Objective Standard for School Forums.

Instead, the Court in *Hazelwood* focused on the relevant officials' *policy and practice:*

> Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations.

Hazelwood, 484 U.S.___, 98 L. Ed. 2d at 603, quoting *Perry*, 460 U.S. at 47. While "[t]he government does not create a

public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse," *"the Court has looked to the policy and practice of the government to ascertain whether it intended* to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 802 (1985), citing *Perry*, 460 U.S. at 46.[6]

2. *Widmar* and *Perry* Employed an Objective Standard for Limited Open Forums.

School officials "intentionally open[] a nontraditional forum for public discourse" by students when they knowingly create an opportunity for or permit the discourse that is sufficient to create the forum. There is no requirement that the school officials specifically intend all possible results of their actions permitting the existence of the forum. For example, the school officials of the University of Missouri at Kansas City specifically intended *not* to permit religious student groups to meet on its campus, *Widmar v. Vincent*, 454 U.S. 263, 265 & n. 3 (1981), but had nonetheless created a public forum, from which religious student groups could not be excluded, by encouraging or allowing other student groups to meet. Similarly, the Court in *Perry* did not analyze evidence of

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[6] "The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent," *Cornelius*, 473 U.S. at 802, citing *Widmar v. Vincent*, 454 U.S. 263 (1981). Here, as in *Widmar*, the property in question is compatible with the proposed expressive activity.

the school officials' subjective intent regarding the schools' internal mail system but instead looked to their *actions*, describing designated forums as "public property which the State *has opened* for use by the public as a place for expressive activity." 460 U.S. at 45.

Here, the school officials affirmatively encouraged the formation of clubs that were student-initiated and noncurriculum related, thereby opening a forum with much more than the minimum necessary permission. Their subjective intention to exclude religious student groups from the forum they had created is irrelevant to the fact of the forum's existence.

B. The Act Is Intended To Be Consistent with the First Amendment Standard for Determining that a Forum Is Opened.

The oft-stated purpose of the Equal Access Act was to codify for public secondary schools this Court's holding in *Widmar v. Vincent*, 454 U.S. 263. *See* S. Rep. No. 357, 98th Cong., 2d Sess. 7-8, 23, 28-29 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, 2348, ___; H. Rep. No. 710, 98th Cong., 2d Sess. 3 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, ___, ___; 130 Cong. Rec. S8332 (daily ed. June 27, 1984) (statement of Sen. Hatch); *id.* at S8338 (statement of Sen. Dixon); *id.* at S8342 (statement of Sen. Hatfield); *id.* at S8358 (statement of Sen. Biden); *id.* at S8364 (statement of Sen. Thurmond); 130 Cong. Rec. H7667 (daily ed. July 24, 1984) (statement of Rep. Perkins). Both the court of appeals and the district court in this case recognized that the purpose of the Act was to codify *Widmar. See Mergens*, 867 F.2d at 1079 & n. 1,

quoting 130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin); *id.* at 1080 ("The language of the EAA closely tracks the holding of the Court in *Widmar*"); *Mergens*, No. CV 85-0-426, slip op. at 7 n. 3 ("The Committee Report discusses *Widmar* at length, and the language of the statute tracks, at least generally, the holdings of *Widmar*, directing their application to public secondary schools").

Further, in defining a "limited open forum" for purposes of the Act, Congress specifically adopted the First Amendment standard for determining when a forum is opened:

> We have used the phraseology that has been used by the courts and educational institutions to circumscribe what would be called a limited forum. We have used the term "limited forum," borrowing that from the courts.

130 Cong. Rec. S8342 (daily ed. June 11, 1984) (statement of Sen. Hatfield).

There can be no question that the Act also incorporates from First Amendment law the insistence that "policy and practice" determine whether a forum has been opened, regardless of school officials' subjective intent. Senator Leahy addressed this point at length:

> It might have been possible under *earlier versions* of the bill to argue that a limited open forum resulted when a *school made a formal decision* to have a limited open forum, for example, by resolution of the school board. Or perhaps the decision might be not to have a limited open forum. Whatever the official decision of the school, the language of the earlier draft might have been interpreted to allow the school's actions to differ from their words. Take the case of a school that decided not to have a limited open forum, having adopted a formal resolution

> to that effect. Suppose that school then decided to consider any student group wanting to meet on school premises during noninstructional time on a case-by-case basis.
>
> Counsel to that school board might well argue that the board's resolution took the school outside the coverage of this bill, since the bill only applies to schools that have a limited open forum, and the resolution states that the school does not have a limited open forum. Since the bill would not apply to this school, the school could then turn around and allow only non-religious clubs or perhaps allow only religious clubs on school premises during noninstructional hours.
>
> The point is that *a limited open forum should be triggered by what a school does, not by what it says*. The careful wording of the current draft will protect both religious and secular interests because it speaks with clarity about what a limited open forum means.

130 Cong. Rec. S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy) (emphasis added). Sen. Dole expressed the same view: the Act's definition of limited open forum "will preclude a school from *practicing* one policy toward the use of school facilities by student groups, while officially adopting another." *Id.* at S8362 (emphasis added).

While the school officials in this case may *say* that no forum has been created and that all student groups are school-sponsored and curriculum related, the objective *facts* demonstrate that many of the student groups are neither truly school-sponsored nor curriculum related. The school's *actions* are determinative under the Act, and this school district has created a limited open forum.

C. The Court of Appeals Correctly Held that Westside High School Has Opened a Forum and that the Forum Must be Open to the Bible Club.

In this case, school officials have by policy and practice opened the facilities of Westside High School for indiscriminate use by student groups, subject only to reasonable and nondiscriminatory time, place, and manner restrictions. Unlike the school newspaper at issue in *Hazelwood*, the forum in question here is not sponsored by the school, it is not "taught by a faculty member during regular class hours," and students do not receive grades or academic credit for their participation. *See* 484 U.S. at ___, 98 L. Ed. 2d at 603. Instead, (i) during noninstructional time, (ii) the school permits students to initiate organizations (Tr. 274:16-25; 288:2-5; 507:5-25; 514:17-20), (iii) with a wide variety of purposes, including community service (Interact, Zonta), business (Future Business Leaders of America), and recreation (Chess Club, Ski Club, Subsurfers Club), and (iv) provides faculty "sponsors" who fulfill the role merely of a monitor and not an instructor. (Tr. 401:23-402:18).

Thus, the forum at issue in this case is identical in every material respect to the forum in *Widmar*, and the school officials' exclusion of the Bible Club was patently improper. The subjective test that was the school officials' ground for excluding the Bible Club is as much a violation of the First Amendment as an overt discrimination between religious and nonreligious student groups, and is equally a violation of the Equal Access Act and its carefully tailored objective test for the existence of an open forum.

CONCLUSION

The Eighth Circuit correctly held that the forum at Westside High School included noncurriculum related groups under the Equal Access Act, that the school had therefore opened a limited open forum under the Act and the First Amendment, and that the forum must be open to the Bible Club on the same basis as other student organizations. Moreover, the Eighth Circuit properly construed the Equal Access Act to prescribe an objective test for the existence of a limited open forum and for curriculum-relatedness and school sponsorship, which is the standard required by the First Amendment under this Court's decisions eschewing arbitrary official discretion over expressive activities. CASE respectfully urges this Court to affirm the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

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Respectfully submitted,

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